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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

REPLY BRIEF FOR PETITIONER MOISES SANCHEZ-LLAMAS

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SUMMARY OF ARGUMENT

Respondent and its *amici* concede that treaties can create individual rights, but they insist that Article 36 of the Vienna Convention on Consular Relations—and the secondary sources relied on to explain it—mean something other than what their plain words say. Respondent's tortured attempts to explain away text and history only serve to demonstrate that the obvious reading of Article 36 is the correct one: It creates individual rights, just as it says it does.

Respondent and its *amici* also repeatedly confuse treaty interpretation with U.S. constitutional law. This confusion pervades their arguments both on the existence of judicially enforceable individual rights and on the availability of a suppression remedy. Here, Article 36(1) of the VCCR confers rights, and Article 36(2) specifies that domestic procedures must give those rights full effect, but it is Article VI of the U.S. Constitution that makes those rights judicially enforceable in this country. In seeking an explicit judicial remedy in the treaty beyond the general direction provided by Article 36(2), Respondent and the United States ignore or distort the legions of cases in which this Court has enforced treaty rights without any requirement that the treaty itself mention judicial enforcement.

Respondent and its *amici* also fail to apprehend that because a treaty is federal law, the consequences of its violation are also matters of federal law, binding in both state and federal courts. The Article 36 rights of a detained foreign national—whether an alien in the United States or a U.S. citizen abroad—ensure that the individual is not denied the protections that the law affords because of unfamiliarity with the system or other unique disadvantages experienced by individuals caught up in the justice system of a foreign land. In the U.S. legal system, suppression of statements is the only remedy sufficient to give effect to rights under Article 36 in cases, like this one, in which a violation of those rights prejudices an individual's right against self-incrimination. Because the Oregon courts erred in holding that no remedy was available for the violation of Mr. Sanchez-Llamas's Article 36 rights, its judgment should be reversed.

ARGUMENT

I.

PETITIONER HAS INDIVIDUAL RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS THAT ARE JUDICIALLY ENFORCEABLE UNDER UNITED STATES LAW.

A. Article 36 Confers an Individual Right to Be Informed of the Rights of Consular Notification and Access.

1. Respondent Effectively Concedes That By Its Plain Language Article 36 Creates Individual Rights.

Respondent and the United States as *amicus curiae* both concede, as they must, that the VCCR is self-executing. Resp. Br. 9; U.S. Br. 14. They also concede that, as a result, the VCCR has the effect of a federal statute. *Id.*

Respondent and the United States further concede that treaties may create "individual rights"—that is, obligations owed by a nation directly to a private person as distinct from obligations solely between nations—even though those treaties are primarily agreements between nations. Resp. Br. 9, 14; U.S. Br. 11; *see also* U.S. Br. 13-14. Respondent even concedes that the obligation in Article 36(1)(b) to "'inform the person concerned without delay of *his rights* under this subparagraph' ... creates [a] *direct obligation* for the authorities of the receiving state *to the detained individual.*" Resp. Br. 17 (emphasis added); *see also id.* at 16.[1]

Respondent argues, however, that the import of the rights-creating provisions in Article 36 is "expressly limited by the introductory text of Article 36(1)." Resp. Br. 17. That text says that the obligations of Article 36(1) are created "'[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State.'" *Id.* (quoting Article 36(1)). According to Respondent, the goal of Article 36 to promote these consular functions somehow implies "that the obligations of the receiving state to facilitate those functions

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[1] Indeed, the Oregon legislature has enacted a statute directing that police officers in the state be trained to "identify situations in which the officers are required to inform a person of *the person's rights* under the convention." OR. REV. STAT. § 181.642(2) (2003) (emphasis added).

are owed to the sending state, not to the nationals of the sending state." *Id.*

The strained inferences Respondent tries to draw from the stated purpose of Article 36(1) should be rejected. As an initial matter, as Respondent recognizes, "'[a] treaty's plain language controls absent "extraordinarily strong contrary evidence.'" Resp. Br. 13 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The plain meaning of the rights-conferring provisions of Article 36 would control over Respondent's speculative interpretation of Article 36's purpose even if that interpretation were plausible. Respondent offers no reason why the "rights" described in Article 36 should be interpreted as anything other than "rights."

Moreover, there is patently no merit in Respondent's suggestion that giving individuals "rights," VCCR art. 36(1)(b), is incompatible with the purpose of Article 36 to facilitate the exercise of consular functions. A consulate's core functions include "protecting in the receiving State the interests of the sending State *and of its nationals*" and *"helping and assisting nationals* ... of the Sending state." VCCR art. 5(a), (e) (emphasis added); *see also* Resp. Br. 17 (conceding that consular functions "may benefit foreign nationals"). Conferring on detained nationals the right to be informed of the availability of consular assistance obviously strengthens and safeguards the consulate's ability to fulfill that function.[2] After all, consulates exist to serve and protect their citizens, not *vice versa*.

Respondent and the United States assert that there is a "presumption" against treaties creating individual rights. Resp. Br. 13; U.S. Br. 11. That assertion has no support in this Court's precedents. Pet. Br. 31-35. On the contrary, this Court

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[2] Creating private rights is a common means of promoting a public purpose. *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S. Ct. 2444, 2447 (2005) (private right of recovery in *qui tam* suit under False Claims Act helps "polic[e] [the] proscription" against presenting fraudulent claims to the government); *Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1455, 1458 (2005) (undisputed that statute enacted to "encourage the rapid deployment of new telecommunications technologies" created private "rights").

has repeatedly held that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *see also* Pet. Br. 17 (citing additional cases). As Petitioner has explained, Respondent's supposed presumption against individual rights rests entirely on lower courts' misreading of language taken out of context from this Court's decisions. *See* Pet. Br. 31-33.[3] The observation that most treaties do not create individual rights reflects the subject matter of most treaties, which affect matters in which no individual has a particular interest, rather than any bias against recognizing individual rights when the treaty concerns such rights.[4] Finally, even if there *were* such a presumption, it would be overcome here by the unambiguous rights-creating language of the treaty.

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[3] The United States also relies, U.S. Br. 12, on *Johnson v. Eisentrager*, 339 U.S. 763, 789 & n.14 (1950), but that case dealt only with whether United States district courts had jurisdiction to hear habeas corpus petitions by aliens detained outside the United States, not with whether any treaty created individual rights. *See id.* at 767-68, 790-91; *see also Rasul v. Bush*, 542 U.S. 466, 475-79 (2004) (construing *Eisentrager* as addressing only constitutional entitlement to habeas corpus review). Read in that context, the *Eisentrager* footnote cited by the United States says nothing about the application of treaties in cases *within* the jurisdiction of a United States federal or state court. Even were the footnote read to suggest a view about individual rights under the "scheme of the [a]greement" at issue there (namely, the now-superseded 1929 Geneva prisoner of war convention), 339 U.S. at 789 n.14, it would have no relevance to the different scheme of Article 36 of the VCCR.

[4] The United States quotes the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987), as stating that most treaties do not create individual rights, but omits the remainder of the quotation, which states that this is a question of treaty interpretation. *See* U.S. Br. 12. The United States also does not mention the text of the rule to which this comment is attached: "A private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense." RESTATEMENT § 907(1).

2. The Extratextual Sources That Respondent Cites Confirm That the VCCR Creates Individual Rights.

Respondent's nontextual arguments against interpreting the VCCR in accordance with its plain terms also lack merit. As Petitioner has already explained, the VCCR's negotiating history, the understanding of the Executive Branch and Senate at the time of ratification, the longstanding subsequent practice of the United States, and the judgments of the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31), and in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. No. 104 (June 27), all confirm that Article 36 creates individual rights. Pet. Br. 20-28. As Petitioner has also explained, the newly minted litigation posture of the United States in this case and in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), deserves no deference. *See* Pet. Br. 25-26.

Contrary to the suggestion of *amici* supporting Respondent, U.S. Br. 26 & n.9, Br. of Law Profs. Supporting Resp. 11-12, the decisions of foreign courts also overwhelmingly support the view that Article 36 creates an individual right to be informed of the right to request consular notification and access. For example, the German case relied upon by the United States, U.S. Br. 26 n.9, expressly holds that "not only does [VCCR Article 36(1)(b)] contain provisions between states, but it can also give rise to personal rights of the individual national under the conditions indicated therein." Judgment of Nov. 7, 2001, No. 5 StR 116/01, at 3 (BGH) (translated from German) (relying on *LaGrand* and on Article 36's use of the phrases "if he so requests" and "if he expressly opposes it").[5] Similarly, contrary to the United States' contention, the Australian court in *R. v. Abbrederis*, 51

[5] Regardless of the merits of the German court's questionable holding that existing German law was, with one exception, sufficient to give effect to the individual rights created by Article 36, *see id.* at 4, that holding obviously does not support the United States' contention that Article 36 creates no individual rights. Moreover, the decision predates the ICJ's *Avena* judgment, and a challenge to the decision is currently pending before Germany's Federal Constitutional Court. Nos. 2 BvR 2115/01, 2 BvR 2132/01, 2 BvR 348/03 (BVerfG).

F.L.R. 99 (N.S.W. Ct. Crim. App. 1981), did not hold that the Vienna Convention confers no individual rights, U.S. Br. 27 n.9, but rather interpreted Article 36 not to apply to ordinary questioning by customs officials at the border. 51 F.L.R. at 115. Numerous other cases from the courts of our treaty partners also either directly hold or assume without question that a detained foreign national has an individual right to be notified of the availability of consular assistance under VCCR Article 36. *See, e.g.*, NACDL Br. 16-23. Respondent and its *amici* are able to cite only a single foreign case suggesting otherwise, *Canada v. Van Bergen*, 261 A.R. 387, ¶ 15 (Alberta Ct. App. 2000), which the United States acknowledges is contrary to other case law in Canada and elsewhere, *see* U.S. Br. 26-27 n.9.

Indeed, 42 foreign nations have appeared as *amici curiae* in this case or in *Medellín v. Dretke*, 125 S. Ct. 2088 (2005), to state the position that Article 36 creates individual rights. No foreign nation has appeared as *amicus* in support of Respondent's position.

3. Whether a Treaty Confers an Individual Right Does Not Depend Upon the Subject Matter of the Right.

In the face of two centuries of decisions in which, the United States acknowledges, this Court "has given effect to self-executing treaty provisions at the behest of private individuals," the United States contends that "[m]ost of those cases involve explicit treaty provisions that guarantee to individual aliens freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property on the same basis as United States citizens." U.S. Br. 13. The provisions of Article 36, the United States suggests, are "plainly of a different order from the commercial and property rights afforded by those treaties." *Id.*

The United States identifies no principled basis for its suggestion that treaty language addressing the property and commercial interests of foreign nationals should be read differently than similar language designed to protect the liberty and physical security of those same nationals. Surely that hierarchy of values would disturb Americans detained abroad who could otherwise rely on the rights reflected in Article 36. There is no reason to distort the normal means of

treaty interpretation because of the nature of the rights at issue here. It should come as no surprise, therefore, that this Court has repeatedly identified individual rights in treaties where individual liberty – not just property or commercial interests – was at stake. *See* Pet. Br. 33-34 & nn.13-14 (collecting cases).

United States v. Rauscher, 119 U.S. 407 (1886), is a prime example. There, the United States indicted an individual for crimes other than those for which Great Britain had extradited him, despite a treaty provision by which the United States had agreed to limit the prosecution to the offense charged in the extradition request. The treaty contained no statement that it created an obligation to individual criminal defendants. Nonetheless, this Court held that the indictment had to be dismissed because the defendant had a treaty right not to be prosecuted for the crime with which he was charged.[6]

B. The Supremacy Clause Requires That the Treaty Be Applied as the Rule of Decision Here.

1. Whether a Treaty Right May Be Judicially Enforced Is a Question of United States Constitutional Law.

Respondent and the United States argue throughout their respective briefs that Article 36 rights may not be invoked by an individual criminal defendant because no mechanism for judicial enforcement can be found in the VCCR itself. *See, e.g.*, Resp. Br. 6-7, 13-32; U.S. Br. 8, 17, 19. That argument confuses – in the most basic way – the international obligation that the United States has undertaken in the VCCR, on the one

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[6] The United States' suggestion, U.S. Br. 14, that *Rauscher* was based on statute or customary law is plainly wrong. In *Rauscher*, this Court dismissed an indictment on the basis of its interpretation of a treaty, 119 U.S. at 419-23, and only secondarily looked to a statute as settling "any doubt upon this construction of the treaty itself," not as to the treaty's enforceability, *id.* at 423. Indeed, in *Johnson v. Browne*, 205 U.S. 309, 317 (1907) (quoting *Rauscher*, 119 U.S. at 422), this Court expressly rejected the position now argued by the United States, and held that the treaty alone sufficed for *Rauscher*'s holding even without the statute. The Court emphasized in *Johnson* that "[t]he manifest scope and object of the treaty itself, *even without those sections of the Revised Statutes*, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted." *Id.* at 318 (emphasis added).

hand, and the means by which the United States gives effect to that obligation, on the other. The former is a matter of international law, while the latter is a matter of United States constitutional law—specifically, the Supremacy Clause. *See* Pet. Br. 8-9, 28-29. The failure of the Respondent and the United States to recognize this basic principle pervades their entire argument, both on the existence of an individual right and on the availability of a suppression remedy. Once the basic principle is recognized, their argument falls apart.

The VCCR creates an individual right, but like most treaties, largely leaves to the individual parties the specifics of how the treaty will be given effect in their own widely varying legal and constitutional systems. *See* Pet. Br. 28-29. The VCCR makes this explicit in Article 36(2), which provides that the rights conferred by Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

Different nations have adopted differing solutions to the question of how treaty provisions should be implemented in domestic law.[7] In *this* country, Article VI of the Constitution establishes that "all Treaties" ratified by the United States, like federal statutes and the Constitution itself, are part of the "supreme Law of the Land," so that they are binding on "the Judges in every State." A companion provision in Article III provides that treaty questions, just like federal constitutional and statutory questions, are within the federal "judicial Power." U.S. CONST. art. III, § 2.

Hence, in *this* country, the courts must ensure "the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations." *Rauscher*, 119 U.S. at 418; *see also id.* at 417-19 (quoting and explaining *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580,

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[7] Thus, contrary to what some of Respondent's *amici* suggest, the practice of foreign nations is not instructive on this point. The Supremacy Clause's provision for direct enforcement of treaties was a deliberate departure from the law of England and other nations. *See* Pet. Br. 12; *Rauscher*, 119 U.S. at 417-18.

598-99 (1884), and *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)). As this Court has taught, that choice is given effect by applying a treaty as the "rule of decision" in any case in which it applies, just as if it were a federal statute. *Head Money Cases*, 112 U.S. at 599. Hence, just like a constitutional provision, *see Weeks v. United States*, 232 U.S. 383 (1914), or a statute, *see McNabb v. United States*, 318 U.S. 332 (1943), a treaty need not itself specify that it is judicially enforceable in order for a criminal defendant to invoke it in court, because the Supremacy Clause so specifies. [8]

2. A "Private Right of Action" Is Not at Issue.

Respondent and the United States as *amicus* also mischaracterize the question in this case as whether the VCCR gives Petitioner a "private right of action." Resp. Br. 6-7, 13-32; U.S. Br. 7-8, 11-30. This case, however, is a criminal prosecution, and the cause of action under Oregon's criminal statutes was invoked by the State of Oregon in prosecuting petitioner. *See* Pet. Br. 7, 9. It is beyond question that a party need not have a private cause of action to enforce a right *as a defense*.[9] The United States simply ignores the issue, treating

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[8] The availability of diplomatic or other remedies for treaty violations as between nations also does not negate the courts' role in giving effect to treaties as the law of the land. *United States v. Jung Ah Lung*, 124 U.S. 621, 632-33 (1888) (even explicit treaty provision for diplomatic negotiations did not "exclude[] judicial cognizance, or ... confine[] the remedy of a subject of China, ... to diplomatic action").

[9] *See* Pet. Br. 29 n.9; *compare Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-98 (1971) (recognizing, for the first time, private right of action under Fourth Amendment), *with, e.g., Weeks*, 232 U.S. at 393, 398 (decades earlier, allowing assertion of Fourth Amendment rights by criminal defendant). The United States relies on *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989); but that case holds only that, against the background expectation of sovereign immunity, a treaty creating a sovereign obligation should not be construed to imply a right to sue the sovereign or a waiver of immunity under the relevant provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1). Indeed, *Amerada Hess* illustrates the distinction between a "right of action," which is limited by sovereign immunity, and a substantive "right," which is not. *Compare Amerada Hess*, 488 U.S. at 442-43 (sovereign obligation does not imply "right of

(footnote continued)

"right" and "right of action" as if they were interchangeable. Respondent acknowledges that treaties may be invoked by foreign nationals in United States courts "as shields against local or state governmental actions that breach the terms of those treaties," Resp. Br. 9-10, but fails to acknowledge that that is precisely the situation here: The state prosecuted Petitioner, and Petitioner invoked the treaty to limit the state's ability to do so. The Oregon courts may not ignore federal law—constitutional, statutory or treaty—in a case in which it applies.[10]

II.

SUPPRESSION IS THE REQUIRED REMEDY WHEN AN ARTICLE 36 VIOLATION LEADS TO EVIDENCE PREJUDICIAL TO A CRIMINAL DEFENDANT IN THE UNITED STATES.

A. The Appropriate Remedy for VCCR Violations in the United States Is a Question of Federal Law.

In arguing that this Court may not direct suppression of

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action" against sovereign), *with, e.g., Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (one of the *Virginia Coupon Cases*, 114 U.S. 269 (1885); holding that state obligation could be asserted defensively, though sovereign immunity barred affirmative cause of action).

[10] From the founding of this Nation to the present day, this Court has enforced treaties in a wide variety of procedural postures. It has never required that the treaty itself create a "private cause of action" even when a party has sued directly for an injunction to enforce a treaty, much less when the treaty was invoked in a criminal prosecution, in a habeas corpus petition within the jurisdiction of a court authorized to issue the writ, or in a statutory or common-law civil action. *See, e.g.*, Pet. Br. 33-34 & nn.13-14 (collecting examples of cases dating from 1796 to 2003); *see also, e.g., El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999) (ratified treaty preempted state common law in personal injury action); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 720-25 (2004) (common law creates cause of action for certain violations of customary international law). Moreover, even if an "implied private right of action" were necessary here, the factors that this Court has identified as relevant to such a right of action—including the central requirement that such a cause of action be compatible with the legislative intent, or in this situation, the treatymakers' intent—would be amply satisfied. *Jogi v. Voges*, 425 F.3d 367, 384-85 (7th Cir. 2005) (citing, *e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001)).

statements as a remedy for a VCCR violation even if the foreign national has an individual right, Respondent and the United States make two fundamental errors. *First*, they repeat their error of insisting that the treaty itself do the work that treaties almost invariably leave to domestic law. By looking for a specific remedy within the treaty itself, they both ignore that judicial enforcement of treaties is governed by domestic law, *see supra* Part I.B.1, and disregard the plain language of Article 36(2) of the VCCR itself, which states that Article 36 rights must be given full effect in accordance with country's own procedures. *See* Pet. Br. 15-16, 39-41; *see also Avena* ¶¶ 138, 140-41 (Article 36(2) requires judicial evaluation of prejudice resulting from Article 36 violation).

Second, though conceding that this Court has frequently prescribed remedial rules that are binding in state courts, Respondent and the United States argue that this Court's power to do so is confined to violations of federal *constitutional* rights. Resp. Br. 42; U.S. Br. 31-32 (same). This Court's authority to develop remedies for the enforcement of federal law in state-court criminal proceedings, however, is firmly rooted in the Supremacy Clause, which provides that the Constitution, federal statutes and treaties made by the United States are *all* the supreme law of the land and binding on state courts. While this Court's recent cases in the state criminal-law context have mostly involved constitutional provisions, that is because the most commonly encountered federal restrictions on state criminal proceedings have come from the Constitution itself.

Because a ratified treaty is part of federal law, federal law prescribes the remedies for treaty violations and makes them binding on the state courts. Where federal law prescribes a substantive rule but leaves details of the remedy unaddressed, federal common law fills the gap. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).[11] Where a

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[11] A self-executing treaty is the equivalent of a federal statute, and as with statutes, this Court has applied remedies even under treaties that, unlike Article 36(2), say nothing about domestic remedies. *See, e.g., Cook v. United States*, 288 U.S. 102, 121-22 (1933) (ordering dismissal of forfeiture proceeding to give effect to treaty allowing seizure of British

(footnote continued)

federal interest in uniformity is present in an area of specifically federal concern, this Court will adopt a uniform federal rule rather than borrow state law as the rule of decision. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). Indeed, this Court has recognized that "international disputes implicating ... our relations with foreign nations" constitute one of the few uniquely federal areas in which the Court fashions uniform federal common law even in the absence of a statute or treaty governing the issue. *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640-41 & n.13 (1981) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and other cases).[12]

B. Suppression Is Required to Remedy the Treaty Violation in This Case.

Article 36(2) expressly requires that the rights set forth in Article 36(1) be given "full effect" in the United States legal system. The only way to give those rights "full effect" in the case of foreign nationals who are prosecuted criminally on the basis of inculpatory statements made when they have not been given the protection promised by Article 36(1) is to deny the prosecuting authorities—state or federal—the use of the confession to support a conviction. That conclusion follows from the intended purposes of the rights conferred by Article 36(1), from the special role of confessions in American criminal proceedings both legally and practically, and from the absence of any other adequate remedy.

The basic purpose of Article 36 is to protect detained foreign nationals. As the ICJ observed in *LaGrand*, Article 36

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ships only within one hour offshore, although treaty did not address such proceedings); *United States v. Jung Ah Lung*, 124 U.S. 621, 632-33 (1888) (granting habeas corpus to block exclusion of Chinese national that would violate U.S.-China treaty, although treaty referred only to diplomatic negotiations).

[12] *See also, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."). Indeed, even a private party's rights and liabilities arising under the federal government's ordinary domestic contracts are governed by uniform federal common law. *Boyle*, 487 U.S. at 505.

rights constitute "an interrelated regime designed to facilitate the implementation of the system of consular protection." *LaGrand* ¶ 74; *see also supra* Part I.A.1. That regime addresses the specific situation of an individual who is deprived of his or her liberty and subjected to prosecution, and it recognizes the objective differences between the plight of such an individual in a foreign jurisdiction and in his or her own home country. Whether applied to aliens detained in the United States or to United States citizens detained abroad, *see* Pet. Br. 46, Article 36 does not confer special privileges on foreign nationals, but instead levels the playing field by ensuring that they understand and hence can meaningfully exercise the rights afforded under the law of the detaining country. *See* Mex. Br. 7-13; Honduras Br. 7-9; EU Br. 5-6; ABCNY Br. 16-23; NACDL Br. 12-15; Memorial of Mexico ¶¶ 56-60, *Avena*. A person arrested in a foreign jurisdiction—an American arrested in, say, Syria, or China, or Colombia—is in an acutely vulnerable position, and the prospect of custodial interrogation exacerbates that vulnerability. *See, e.g., U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on Int'l, Political and Military Affairs*, 94th Cong. 6 (1975) (statement of Hon. Leonard F. Walentynowicz, U.S. Dep't of State, Bur. of Sec. & Consular Affairs) ("With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.").

Criminal justice systems differ significantly from country to country, both in their formal rules and in their practical operation. Mex. Br. 10-11; NACDL Br. 13; ABCNY Br. 18. For example, some jurisdictions, including Mexico, do not consider confessions unless they are given in the presence of defense counsel and satisfy other requirements. *See, e.g.*, Mex. Br. 10; Memorial of Mexico ¶¶ 375-78, *Avena* (discussing other jurisdictions). Some jurisdictions, again including Mexico, do not permit a conviction based solely on a confession even when a confession is admissible. Mex. Br. 10. Conversely, in some inquisitorial systems, the accused may be interrogated formally and may have no right to remain silent. NACDL Br. 11.

The place of confessions in criminal law and practice in the United States is exceptional. Our system makes exceptional use of them and creates exceptional protections against their misuse. Prosecutors heavily rely on them, and juries commonly take them to be especially convincing proof of guilt. On the other hand, for these very reasons, safeguards against improvident use of confessions is deeply woven into the fabric of our legal tradition. U.S. CONST. amend. V; *id.* amend. VI. As Justice Frankfurter put it in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), "ours is an accusatorial and not an inquisitorial system."

In United States criminal practice, inculpatory statements made to police interrogators are admissible in evidence against a criminal defendant. A criminal defendant may be convicted on the basis of an uncounseled inculpatory statement. Although corroboration is required for conviction, all that usually needs to be corroborated is the corpus of the crime, not the defendant's identity as the perpetrator. On the other hand, once a defendant has been brought into the judicial process, he or she has an inviolable privilege against self-incrimination. The upshot of these features of our system is that police interrogation has become a primary evidence-gathering procedure. In recognition of its prominence—and of its dangers—and of our constitutional commitment to the privilege against self-incrimination, our legal system has evolved a sophisticated complex of rules designed to protect every citizen against being made "'the deluded instrument of his own conviction.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)). These include the rules requiring proof of voluntariness before an inculpatory statement can be admitted, guaranteeing arrested suspects the opportunity for legal representation during interrogation if they wish it, and excluding statements taken in violation of *Miranda* and its progeny. But while these rules may suffice to protect the ordinary citizen, foreign nationals as a class are ill-equipped to invoke their protection. That is precisely what Article 36(1) of the VCCR acknowledges and aims to correct. In the context of the United States legal system, therefore, the rights to consular

notification and access protected by Article 36 operate to secure fundamental safeguards considered essential to a fair proceeding. In determining the remedy that will give "full effect" to Article 36 rights in the United States legal system, this Court must take account of those features.

And the necessary remedy is readily at hand. The legal traditions of this country recognize the availability of a judicially-created exclusionary rule designed to give full effect to the Fifth Amendment right against self-incrimination, principally in order to protect against unreliable statements and deter unlawful police conduct. Pet. Br. 37, 45. Exclusion of inculpatory statements has been used to remedy both constitutional violations, *see, e.g., Miranda*, 384 U.S. 436, 467 (1966) and statutory violations, *see, e.g., McNabb v. United States*, 318 U.S. 332 (1943). In both cases, courts exclude confessions to prevent prejudice to the defendant flowing from unlawful conduct by the authorities and to maintain the integrity of the judicial process by denying the government as prosecutor the benefit of unlawful conduct. *See, e.g., id.* at 345.

As this case illustrates, a violation of Article 36 in circumstances where an incriminating statement has been taken implicates the same considerations that make available exclusion in the case of constitutional and statutory violations. *First*, an Article 36 violation deprives the arrested foreign national of the information that the treaty intends that he possess when making choices that have legal consequences—including choices concerning the exercise of constitutional rights relating to self-incrimination. Pet. Br. 41-44; Mex. Br. 9-11. Choices made without the requisite notice are not fully informed choices. *Cf. Oregon v. Elstad*, 470 U.S. 298, 310 (1985).

Second, an Article 36 violation increases the intrinsically coercive character of custodial interrogation, particularly for foreign nationals from jurisdictions where fear of police abuse is justified by the practice at home. The knowledge that a consular officer may be contacted for information and assistance is a vital safeguard to dispel the threat otherwise represented by police custodial interrogation. For example, the typical American arrested abroad will place infinitely greater faith in the prospect of information and assistance from an

American consular officer than from any local lawyer, court official, or *gendarme*.[13]

Given the purpose of consular notification and access, an Article 36 violation can impact a criminal prosecution in a way that implicates exactly the same concerns about unreliable confessions and unlawful police conduct which underlie the exclusion remedy in analogous contexts. Pet. Br. 44-48.[14] Yet neither Respondent nor the United States identifies any other remedy by which courts in the United States could fulfill their constitutional obligation to apply the treaty as the rule of decision and provide a remedy for its violation. Resp. Br. 43-45; U.S. Br. 34 n.13, 41. Respondent takes refuge in the possibility that "traditional political remedies for violations of international treaties," such as Oregon's voluntary compliance program, could potentially reduce the incidence of future violations in other defendants' cases. Resp. Br. 44-45. The

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[13] Contrary to the Government's assertion, U.S. Br. 37, 39, Mr. Sanchez-Llamas does not contend that interrogations must always cease until a consular officer is present. Interrogating authorities must give the notification without delay as soon as they have reason to know of an arrestee's foreign nationality and must facilitate consular communication and access, again, without delay. (In the present case, for instance, notification was required shortly after arrest and before incriminating statements were made, when officers had reason to know of Mr. Sanchez-Llamas's Mexican nationality.) If these requirements are met, there may be circumstances in which this Court could hold consistently with Article 36(2) that the rights conferred by Article 36(1) have been respected, and that interrogators could lawfully proceed. But that is a question for decision in a case that raises it, not Mr. Sanchez-Llamas's.

[14] Consistent with the use of the exclusionary rule in other contexts, it would not necessarily follow that confessions made in the context of a Vienna Convention violation could not be used for other purposes at trial, such as impeachment, or admitted in the rare circumstance in which a public emergency might justify noncompliance with Article 36. *Cf. Harris v. New York*, 401 U.S. 222 (1971) (statement that police obtain in violation of the *Miranda* rule can be used to impeach a defendant, provided the statement is otherwise "voluntary"); *New York v. Quarles*, 467 U.S. 649 (1984) (finding that officers' failure to provide *Miranda* warnings was justified or mitigated by a public emergency or other exigent circumstance).

United States suggests that the Executive Branch has the "primary responsibility for ensuring compliance with the VCCR," and hence that a ruling by this Court on an appropriate judicial remedy "would be inappropriate in light of a contrary executive branch determination concerning the steps necessary to ensure compliance with a treaty." U.S. Br. 34 n.13.

Again, Respondent and the United States fail to appreciate this Court's constitutional role in the enforcement of treaty rights. Contrary to the United States' suggestion, this Court cannot defer to the Executive's view of the enforcement regime reflected in the Supremacy Clause and Article III. Pet. Br. 39-41. Since the earliest days of the Republic, this Court has recognized that the Framers did not intend to leave the enforcement of individual treaty rights to the "voluntary" efforts of the several states or to the grace of the Executive Branch. Pet. Br. 25-26.[15] To the contrary, the judicial remedy of suppression provides the means by which the United States can give "full effect" to the Article 36 rights of criminal defendants.

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[15] Nor is it sufficient to subsume the Article 36 violation into an analysis of due-process voluntariness or the validity of a *Miranda* waiver. Resp. Br. 43 n.19; U.S. Br. 41. To be sure, facts underlying the Article 36 violation, as well as the violation itself, should be considered by courts analyzing these issues. But treaty rights constitute rights distinct from constitutional rights, so that an Article 36 violation would constitute an independent basis for relief. To address the treaty violation only insofar as it might contribute to the violation of a different, constitutional right would be contrary to this Court's enforcement of treaty rights on their own terms. Pet. Br. 29-34. Moreover, it would conflict with the ICJ's determination that in order to satisfy the "full effect" mandate of Article 36(2), the rights conferred by Article 36(1) must be given full weight by courts considering remedies for their violation. *Avena* ¶ 139 (rejecting United States argument that Article 36 violations can be addressed in the context of the due process rights arising under the U.S. Constitution). Finally, it would be contrary to this Court's long-standing jurisprudence to find that a waiver of *Miranda* rights somehow implies a waiver of Mr. Sanchez-Llamas's distinct rights under the Vienna Convention. *See, e.g.*, NACDL Br. 25-26 (citing cases).

C. An Article 36 Violation Requires That the Prosecution Show No Prejudice.

When the state seeks to introduce evidence at a criminal trial, it has the burden of proving its admissibility. *See* Pet. Br. 48. Hence, when an Article 36 violation has been shown, the state must demonstrate that the defendant has not been prejudiced. *Id.*[16] To the extent that Petitioner had a burden to produce *prima facie* evidence of an Article 36 violation, he met that burden when the prosecutor conceded that the police failed to meet their responsibility under Article 36.[17] At that juncture, the burden shifted back to the state to present competent, non-speculative evidence that advising Mr. Sanchez-Llamas of his Article 36 rights would not have affected the choices he made with regard to his legal rights. This could be done by demonstrating that Mr. Sanchez-Llamas would not have asserted his right to have the consulate

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[16] Respondent relies on *Breard v. Greene*, 523 U.S. 371 (1998), to place the burden on defendant, Resp. Br. 45, but in that case defendant was the plaintiff in a habeas corpus proceeding. Respondent also relies on various Fourth Amendment cases, Resp. Br. 47, but those cases involved the distinguishable question of whether an illegal search and seizure had, by "fruit of the poisonous tree" analysis, led to derivative evidence.

[17] In its response, Respondent suggests for the first time in the course of this litigation that the arresting officers did not know that Mr. Sanchez-Llamas was a Mexican national at the time of his arrest and eleven-hour interrogation. Resp. Br. 38-39. Any doubt on this point is quickly dispelled by review of the record. The duty to advise a foreign national of his Article 36 rights arises "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena* ¶ 63. Here, there was ample evidence that officers had reason to believe that Mr. Sanchez-Llamas was a Mexican national from the time he was first arrested. *See, e.g.*, Tr. 122-23, 129, 176 (officers gave *Miranda* warnings in Spanish because he understood little English); Tr. 124 ("[Arresting officers] asked about how long he had been in the United States. He said 7-11 years."); 177, 183 (informed officer he was from the state of Jalisco in Mexico). The United States agrees. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 18 (list of objective criteria for determining foreign nationality includes unfamiliarity with English and verbal statements indicating a place of birth outside the United States).

notified and would not have sought to communicate with the consulate, or that the Mexican consulate would not have provided any assistance. In addition, the state might try to demonstrate that its failure to provide notice was not prejudicial: for example, that the defendant had previously been advised of his or her consular rights and had waived them; or that the defendant's relations with his or her own country were such that he or she would not have wanted to attract its attention. Oregon made no such showing here.

If this Court should for any reason decide that an arrested national has the burden of showing prejudice, the case should be remanded to allow the state courts to make that determination in the first instance. Were Mr. Sanchez-Llamas required to demonstrate prejudice, he could do so even on this record, where the trial court refused to make prejudice findings as to the Article 36 violation in his case, upon holding—erroneously—that the treaty could not provide a remedy in the criminal prosecution against him. Mr. Sanchez-Llamas was subjected to an interrogation spanning over eleven hours in custody following a police beating severe enough to require that part of the interrogation be conducted over his hospital bed. Tr. 123, 129-134, 142. The record reflects that, at the time of his interrogation, Mr. Sanchez-Llamas spoke and understood very little English. It also demonstrates that he was confused about his legal rights under U.S. law. In particular, he did not understand the consequences of making statements to the police under U.S. law, which differ fundamentally from the consequences under Mexican law. *See* Mex. Br. 10. For example, when asked to describe the *Miranda* rights, Petitioner explained, "That it would be better if I told the truth and everything." Ex. 1, at 64. When asked if the officers had frightened him into cooperating, he answered that he understood that he would receive a longer sentence if he did not cooperate: "Yes, that, that, that I was going to, to be, ah, locked-up [*sic*] longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all." Ex 1, at 66.

Consular officers could have dispelled these fundamental misunderstandings.[18] During the period when Mr. Sanchez-Llamas was arrested, as today, Mexico provided comprehensive consular assistance to its nationals detained in the United States, including by explaining their legal rights while under interrogation. *See* Mex. Br. 11-13; ABCNY Br. 20-21. There is no indication that for any reason Mr. Sanchez-Llamas would have refused Mexican consular assistance had he been advised of his Article 36 rights.

CONCLUSION

For these reasons and the reasons set forth in petitioner's opening brief, petitioner respectfully requests that the Court reverse the judgment of the Supreme Court of Oregon, set aside petitioner's conviction and sentence, order petitioner's confession suppressed, and remand the case for a new trial.

Respectfully submitted,

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[18] Mr. Sanchez-Llamas even made incriminating statements that were affirmatively proven untrue at trial. For example, during the interrogation, Mr. Sanchez-Llamas admitted firing two guns, Ex. 1, at 24, 50, apparently because he believed that is what the police wanted him to say, but the evidence at trial established that only one of the two guns had been fired, Tr. 485, 584-85, 719-20, 730, 771 (five or six shots from chrome .357 magnum revolver); *id.* at 732 (no shots from other gun).